TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 201.

OTIS CLAPP, COLLECTOR OF INTERNAL REVENUE, PLAINTIFF IN ERROR,

vs.

WILLIAM P. MASON AND CHARLES HENRY PARKER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED OCTOBER 20, 1874.

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1 UNITED STATES OF AMERICA, *ss :*

The President of the United States to the honorable the judges of the circuit court of the United States for the district of Massachusetts, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between William P. Mason and Charles Henry Parker, both of Boston, in the district of Massachusetts, plaintiffs, and Otis Clapp, of said Boston, defendant, in an action of contract, a manifest error had happened, to the great damage of said defendant, as by his complaint appears:

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right, and according to the laws and custom of the United States, should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court, the tenth day of September, in the year of our Lord one thousand eight hundred and seventy-four.

JOHN G. STETSON,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by

G. F. SHEPLEY,
Circuit Judge of the United States, First Judicial Circuit.

2 Circuit court of the United States, district of Massachusetts, ss:

And now here the judges of the circuit court of the United States in and for the district of Massachusetts make return of this writ by annexing hereto and sending herewith, under the seal of the said circuit court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In witness whereof I, John G. Stetson, clerk of said circuit court of the United States in and for the district of Massachusetts, have hereto set my hand and the seal of said court this tenth day of October, A. D. 1874.

[SEAL.] JOHN G. STETSON, *Clerk.*

Defendants in error hereby acknowledge due and sufficient service of the foregoing writ of error, and of a citation thereon, entitling said writ of error to be entered in said Supreme Court of the United States at the October term, A. D. 1874.

RUSSELL & PUTNAM,
Attys. for Dft. in Error.

3 UNITED STATES OF AMERICA,
Massachusetts District, ss :

At a circuit court of the United States for the first circuit, begun and

holden at Boston, within and for the district of Massachusetts, on Friday, the fifteenth day of May, in the year of our Lord one thousand eight hundred and seventy-four, before the honorable Nathan Clifford, associate justice.

WILLIAM P. MASON AND CHARLES HENRY Parker, both of Boston, in the district of Massachusetts, plaintiffs, v. OTIS CLAPP, OF SAID BOSTON, DEFENDANT.	In an action of contract.

4 And the plaintiff says the defendant owes him six hundred sixteen dollars and ninety-eight cents ($616.98) for money received by the defendant to the plaintiffs' use.

Bill of particulars.

1873. May 31. To money paid by plaintiff to defendant as collector of internal revenue of the fourth district of Massachusetts, as succession duties on the estate of Wm. P. Mason, deceased, the same being lawfully due to the U. S., (1)..... $600 00
Dec. 23. To interest from May 31 to Nov. 20, 1873, (2)..... 16 98

$616 98

And the plaintiff further says that he was assessed upon the fifth day of May, A. D. 1873, by Jonathan H. Mann, assessor of the 4th district of the commonwealth of Massachusetts, an internal-revenue tax of $600 upon real estate descending to said plaintiff as successor to Wm.
5 P. Mason, deceased, by virtue of the will of said Mason, after the death of Hannah B. Mason, wife of said testator, to whom it was devised for her life, which said tax he afterwards, to wit, on the 31st day of said May, paid to the defendant, collector of internal revenue of said district; that said payment was made under protest and to avoid distraint or other forcible process to collect the same, the said plaintiff protesting that said tax was not due from him, for the reason that it had not accrued to the United States at the time when the repeal of the succession-tax act went into effect. That said plaintiff made a claim for refunding the same on the 9th day of June, A. D. 1873, to J. W. Douglass, the Internal Revenue Commissioner of the United States, on the ground that the assessment and payment of said tax was erroneous and improper for the following reasons:

That the said property did not vest in possession to said plaintiff until the death of the testator's wife on the 19th day of June, A.
6 D. 1872, after the repeal of the said act, which took effect October 1, 1870, and that said tax had not therefore accrued at the time of said repeal going into effect.

Further, that on the 20th day of November, A. D. 1873, said Commissioner notified the plaintiff that said claim was rejected, and the plaintiff says the defendant owes him the said sum of six hundred sixteen dollars and ninety-eight cents, ($616.98,) to the damage of the said plaintiffs, as they say, the sum of one thousand dollars.

The writ in this cause is dated the twentieth day of November, A. D. 1873, and is made returnable before the justices of the superior court of the commonwealth of Massachusetts, then next to be holden at Boston, within and for the county of Suffolk, on the first Tuesday of Jan-

uary, A. D. 1874. This cause after entry in said superior court was removed to this circuit court by writ of certiorari, issued upon
7 the petition of said defendant, dated the third day of February, A. D. 1874, and made returnable before this circuit court at the May term thereof, A. D. 1874. This cause is duly entered here at the present term, when and where the parties appear by their respective counsel; and on the second day of June, A. D. 1874, the following agreed facts are filed, namely:

Agreed facts.—Filed June 2, 1874.

This is an action brought in the State court, and removed by the defendant to this court by certiorari, to recover back a succession-tax paid under protest to defendant as collector of internal revenue for the fourth Massachusetts district. The writ is dated November 20, 1873.

William P. Mason, the plaintiff's testator, died December 4, 1867. By his will, the real estate upon which the tax in question was levied was devised to his widow for her life, or until she should cease to occupy the same as a place of residence, and upon her death, or ceasing so to occupy the same, to the plaintiff.

The widow occupied the said real estate as her residence until her death, on June 17, 1872.

May 15, 1873, the tax in question was assessed by Jonathan H. Mann, assessor of said district, and May 31, 1873, plaintiff paid defendant said tax under protest, to avoid distraint or other forcible process to collect the same.

June 9, 1873, plaintiff duly made claim upon the Commissioner of Internal Revenue for the refunding of said tax, for the reason that the said property did not vest in possession in the plaintiff until the death of the testator's widow, which occurred after October 1, 1870, the date at which the repeal of the succession-tax went into effect, and that the tax had not accrued at said date so as to come within the saving clause of the act of repeal, (act of July 14, 1870, section 17.)

November 15, 1873, the Commissioner of Internal Revenue rejected the appeal, "for the reason that the tax was due, properly assessed, and collected" within said saving clause, "as held by the circuit court of the United States for the district of Massachusetts in the case of May v. Slack."

8 If upon the above facts the court are of opinion that the tax was wrongfully assessed and collected, judgment is to be entered for the plaintiff for six hundred dollars, with interest from May 31, 1873; otherwise, judgment for defendant.

RUSSELL & PUTNAM,
For Plaintiff.
GEO. P. SANGER,
U. S. Atty., for Defendant.

This cause is thereupon set down for hearing, and fully heard before the honorable George F. Shepley, circuit judge, holding said circuit court, who, after due consideration thereon had, to wit, Sept. 3, 1874, files an opinion in said cause, and directs judgment to be entered in accordance therewith. It is thereupon, to wit, Sept. 3, 1874, considered by the court that the said William P. Mason and Charles Henry Parker, plaintiffs, recover of the said Otis Clapp, defendant, the sum of six hun-

dred and forty-five dollars and twenty cents, and their costs of suit, taxed at

A true record.

Attest:

JOHN G. STETSON, *Clerk.*

The following is a copy of the opinion of the court, in accordance with which judgment was entered in said cause September 3d, 1874, namely:

9 *Opinion of the court.*

Circuit court of the United States, district of Massachusetts.

WILLIAM P. MASON }
v. }
OTIS CLAPP. }

SEPT. 3, 1874.

SHEPLEY, J.:

This is an action brought in the State court, and removed by the defendant to this court by certiorari, to recover back a succession-tax paid under protest to defendant as collector of internal revenue for the fourth Massachusetts district. The writ is dated November 20, 1873.

William P. Mason, the plaintiff's testator, died December 4, 1867. By his will, the real estate upon which the tax in question was levied was devised to his widow for her life, or until she should cease to occupy the same as a place of residence, and upon her death, or ceasing so to occupy the same, to the plaintiff.

The widow occupied the said real estate as her residence until her death, on June 17, 1872.

May 15, 1873, the tax in question was assessed by Jonathan H. Mann, assessor of said district, and May 31, 1873, plaintiff paid defendant said tax under protest, to avoid distraint or other forcible process to collect the same.

June 9, 1873, plaintiff duly made claim upon the Commissioner of Internal Revenue for the refunding of said tax, for the reason that the said property did not vest in possession in the plaintiff until the death of the testator's widow, which occurred after October 1, 1870, the date at which the repeal of the succession-tax went into effect, and that the tax had not accrued at said date so as to come within the saving clause of the act of repeal, (act of July 14, 1870, section 17.)

November 15, 1873, the Commissioner of Internal Revenue rejected the appeal, "for the reason that the tax was due, properly assessed, and collected," within said saving clause, "as held by the
10 circuit court of the United States for the district of Massachusetts in the case of May vs. Slack." If upon the above facts the court are of opinion that the tax was wrongfully assessed and collected, judgment is to be entered for the plaintiff for six hundred dollars, with interest from May 31, 1873; otherwise, judgment for the defendant. The act of July 14, 1870, 16 Stat., 256, 261, repealed the special tax "on legacies and successions" imposed by the internal-revenue act of 1864. This repeal took effect on the first day of October, 1870. The seventeenth section of the act of July 14, 1870, provides that "All acts and parts of acts relating to the taxes herein repealed, and all the provisions of said acts, shall continue in full force for levying and collecting

all taxes properly assessed, or liable to be assessed, or accruing
11 under the provisions of former acts, or drawbacks the right to which has already accrued, or which may hereafter accrue, under said acts, and for maintaining and continuing liens, fines, penalties, and forfeitures incurred under and by virtue thereof, and this act shall not be construed to affect any act done, right accrued, or penalty incurred under former acts, but every such right is hereby saved."

The tax in this case was not assessed or liable to be assessed before the first day of October, 1870. It is, however, claimed that, the beneficial interest of the plaintiff having accrued December 4, 1867, on the death of William P. Mason, the testator, its liability to the succession tax or duty, when it became vested in possession, was saved by the exceptions of the seventeenth section in relation to taxes "accruing,"
12 and "rights accrued" under former acts.

The 126th section of the act of 1864 defined a "succession" to denote the devolution of title to any real estate. By the provisions of the succeeding section, every past or future disposition of real estate by will, deed, or laws of descent, by reason whereof any person shall become beneficially entitled, in possession or expectancy, to any real estate, or the income thereof, upon the death of any person dying after the passing of this act, shall be deemed to confer on the person entitled by reason of any such disposition a "succession," and the term "successor" shall denote the person so entitled. The duty payable in case of such succession varied, according as the successor's degree of consanguinity was nearer or remote to the predecessor, from one per centum in case of a successor of lineal issue or a linear ancestor of the predecessor, to a duty of six per centum in case of a stranger in blood or one far removed in degree of collateral consanguinity. Provision was also made that when, before any successor became entitled to the
13 estate in possession, his interest, by reason of death, passed to any other successor, only one duty should be paid, and should be due from the successor who first should become entitled in possession, but such duty should be estimated at the highest rate which, if every successor had been subject to duty, would have been payable by any one of them. The duty was not payable until the successor became entitled in possession, (act of 1864, sec. 137.) By the provisions of the 145th section, the duty became a lien on the succession after assessment. By the act of July 13, 1866, the assessment was to be made at the expiration of thirty days after the successor came into possession. Thus it will be seen that on the first day of October, 1870, when the repealing act took
14 effect, it was uncertain when any duty was to be paid, upon what value it was to be paid, at what rate of duty it was to be assessed and payable, and against whom it would be assessed. No tax had then accrued or was accruing against William P. Mason. Before any one became entitled in possession the succession might pass by death, by the laws of descent, or otherwise through many different persons. Although when a successor became entitled in possession the duty would have been assessable at the highest rate to which any successor in the line would have been liable had he come in possession, the duty did not accrue against that one or any other of the successors in the line except the one who became entitled in possession, and not against him until he became so entitled. When he became so entitled in possession,
15 the duty accrued against him, the right accrued, although the assessment could not be made until the expiration of thirty days. Only one duty accrued against only one successor, however many there might have been in the line of succession. If the successor who became

entitled in possession died before the first day of October, 1870, and the thirty days had not elapsed, and the assessment had not been made, the case would have been within the exception, because the duty would have accrued against him, the right to the duty would have become absolute, the rate of duty would have become fixed, and the person liable to pay it have been determined. The evident intention of this exception was to provide for levying and collecting such sums as should have been assessed before October 1, 1870, and such duties as before that
16 time had accrued against any particular person, where, as against him, the right had accrued and become absolute, although the assessment had not been made. The expression used in the 134th section, "but such duty shall be at the highest rate which, if every successor had been subject to duty, would have been payable by any one of them," recognizes the fact that only that successor was subject to duty who entered into possession. The definition of a succession in sec. 127, making it embrace interests "in expectancy," does not aid in the construction of this excepting clause, as it could not for a moment be contended that a duty accrued against one having only a contingent interest. In the sections 125 and 128, the duty is referred to as accruing at the time of the final ascertainment of the tax, and the interest in the succession as
17 accruing when the successor is entitled to possession. As the act of 1870 provided that taxes upon real or personal estate which may by any disposition become subject to trusts for charitable purposes, are repealed, and no such taxes, whether already levied or not, shall thereafter be collected, the plaintiff might have disposed of his interest before the termination of the life-estate by a conveyance in trust for charitable purposes, so that no tax would have been payable upon it. A duty could not have accrued as against him when it was in his power so to dispose of the estate that no duty would ever be payable upon that succession.

The case of May vs. Slack (16 Int. Rev. Record, 134,) was a case where the testator died in February, 1870, having made by will certain pecuniary legacies, which were paid by his executors in April, 1871. It is plain that the duty had accrued on these legacies, because they
18 were then absolutely due to the specific legatees. The legacy was debitum in presente, even if it was solendum in futuro. The amount was fixed, the rate was determined, the person ascertained who was to receive the legacy, the person ascertained who was to pay the duty. No one of these elements exist' in this case, and the case before the court cannot fall within the rule or the reasoning in the opinion in that case. If the duty in this case was rightly assessed, then it follows that it would be necessary to continue the whole machinery of the internal-revenue system to assess and collect duties upon remainders whenever after the lapse of years the life-estate determines. It is clear from the general policy of the statute that the excepting clause was never designed to have that effect. Judgment is to be entered for the plaintiff
19 for six hundred dollars, with interest from May 31, 1873, in accordance with the stipulation in the agreed state of facts.

20 UNITED STATES OF AMERICA,
District of Massachusetts, ss:

I, John G. Stetson, clerk of the circuit court of the United States for the first circuit and district of Massachusetts, certify that the foregoing is a true copy of the record and of all proceedings in the cause of Otis Clapp v. William P. Mason et al., in this circuit court determined.

In testimony whereof I hereunto set my hand and affix the seal of

said circuit court, at Boston, in said district, this sixteenth day of October, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the United States the ninety-ninth.

[SEAL.] JOHN G. STETSON,
Clerk.

(Indorsement on cover:) No. 201. Otis Clapp, collector of internal revenue, plaintiff in error, vs. William P. Mason and Charles Henry Parker. Massachusetts C. C. U. S. Filed 20 October, 1874.

In the Supreme Court of the United States.

OCTOBER TERM, 1876.

OTIS CLAPP, COLLECTOR, ETC., *vs.* WM. P. MASON ET AL. } No. 201.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

Brief for the Plaintiff in Error.

PHILADELPHIA BAR ASSOCIATION

In the Supreme Court of the United States.

OCTOBER TERM, 1876.

OTIS CLAPP, COLLECTOR, ETC.
vs.
WM. P. MASON ET AL. } No. 201.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR THE PLAINTIFF IN ERROR.

STATEMENT.

Suit to recover succession tax paid under protest by original plaintiff (Mason & Parker) to Mr. Clapp, then collector of internal revenue for the fourth district of Massachusetts.

Submitted to the court upon these agreed facts: Wm. P. Mason, the plaintiffs's testator, died December 4, 1867, devising to his widow *for her life*, or so long as she should personally occupy the same as a residence, the real estate upon which the tax in question was levied, and upon her death, or ceasing so to occupy it, it was to go to the plaintiffs. The widow so occupied it till her death, June 17, 1872.

May 15, 1873, the tax in question was assessed and was paid the last day of that month, under protest, to avoid distraint.

June 9, 1873, the plaintiffs made claim upon the Commissioner of Internal Revenue to have the tax refunded, for the alleged reason that the property did not vest until the death of the testator's widow, which occurred subsequently to October 1, 1870, the date at which the repeal of the succession tax took effect, and that the tax had not accrued at said date so as to come within the saving clause of the act of repeal. (Act of July 14, 1870, c. 255, § 17, 16 Stats., 261.)

November 15, 1873, the Commissioner of Internal Revenue rejected the appeal, "for the reason that the tax was due, properly assessed and collected," within the saving clause, "as held by the circuit court of the United States for the district of Massachusetts in the case of May *v.* Slack."

Upon the foregoing facts the court was to enter judgment for the plaintiffs or defendant, according as it should find the tax to be illegally assessed or the contrary. (Record, 3.) Judgment was entered for the original plaintiffs, and the collector brings the question of law here.

ASSIGNMENT OF ERROR.

The plaintiff in error assigns for error the judgment of said circuit court against him, and avers that judgment, upon the facts agreed, should, as matter of law, have been entered in his favor for his costs.

STATUTES.

The section of the act of July 14, 1870, above referred to, is this: "That sections one hundred and twenty, one

hundred and twenty-one, one hundred and twenty-two, and one hundred and twenty-three, of the act of June thirty, eighteen hundred and sixty-four, entitled 'An act to provide internal revenue to support the Government, to pay interest on the public debt, and for other purposes,' as amended by the act of July thirteen, eighteen hundred and sixty-six, and the act of March two, eighteen hundred and sixty-seven, shall be construed to impose the taxes therein mentioned to the first day of August, eighteen hundred and seventy, but after that date no further taxes shall be levied or assessed under said sections; and all acts and parts of acts relating to the taxes herein repealed, and that all the provisions of said acts shall continue in full force for levying and collecting all taxes properly assessed or liable to be assessed, or *accruing* under the provisions of former acts, or drawbacks, the right to which has already accrued or which may hereafter accrue under said acts, and for maintaining and continuing *liens*, fines, penalties, and forfeitures incurred under and by virtue thereof. And this act shall not be construed to affect any act done, *right accrued*, or penalty incurred under former acts, but every such right is hereby saved. And for carrying out and completing all proceedings which have been already commenced or that may be commenced to enforce such fines, penalties, and forfeitures, or criminal proceedings under said acts, and for the punishment of crimes of which any party shall be or has been found guilty." (16 Stat., 261.)

The act of June 30, 1864, (c. 173, §§ 126–150, 13 Stats., 287–291) provided for a tax upon successions.

The first of these sections (126) declared the term real estate, as used in that act, to include all lands, tene-

ments, and hereditaments, corporeal and incorporeal; and "that the term 'succession' shall denote *the devolution of title* to any real estate." (13 Stats., 287.)

The next section (127) declares "that every past or future disposition of real estate by will, deed, or laws of descent, by reason whereof any person shall become *beneficially entitled*, in possession *or expectancy*, to any real estate, or the income thereof, upon the death of any person dying after the passing of this act, shall be deemed to confer on the person entitled by reason of any such disposition a 'succession.'" (13 Stats., 287, 288.)

Section 128 provides "that where any real estate shall, at or after the passing of this act, be subject to any charge, estate or interest, determinable by the death of any person, or at any period ascertainable only by reference to death, the increase of benefit accruing to any person upon the extinction or determination of such charge, estate, or interest shall be deemed to be a succession accruing to the person then entitled, beneficially, to the real estate or the income thereof." (13 Stat., 288.)

The next section provides for a joint succession.

Section 130 is similar to, or the complement of, section 128. It says "that where any disposition of real estate shall be accompanied by the reservation or assurance of, or contract for, any benefit to the grantor, or any other person, for any term of life, or for any period ascertainable only by reference to death, such disposition shall be deemed to confer, at the time appointed for the determination of such benefit, an increase of beneficial interest in such real estate, as a succession, equal in annual value to the yearly amount or yearly value of the benefit so reserved, assured, or contracted

for, on the person in whose favor such disposition shall be made."

Section 131 is, "that where any disposition of real estate shall purport to take effect presently, or under such circumstances as not to confer succession, but, by the effect, or in consequence of any engagement, secret trust, or arrangement capable of being enforced in a court of law or equity, the beneficial ownership of such real estate shall not, *bona fide*, pass according to the terms of such disposition, but shall, in fact, be reserved to the grantor, or other person, for some period ascertainable only by reference to death, the person shall be deemed, for the purposes of this act, to acquire the real estate so passing as a succession derived from the person making the disposition as the predecessor." (*Id.*)

The next section (132) declares "that if any person shall, by deed of gift, or other assurance of title, made without valuable and adequate consideration, and purporting to vest the estate, *either immediately or in the future, whether or not accompanied by the possession, convey any real estate to any person, such disposition shall be held and taken to confer upon the grantee a succession* within the meaning of this act." (*Id.*)

"SEC. 134. *And be it further enacted*, That where the interest of any successor in any real estate shall, before he shall have become entitled thereto in possession, have passed by reason of death to any other successor or successors, then one duty only shall be paid in respect of interest, and shall be due from the successor who shall first become entitled thereto in possession; *but such duty shall be at the highest rate which, if every such successor had been subject to duty, would have been payable by any one of them.*" (*Id.*, 289.)

"SEC. 135. And * * * wherever, after the passing of this act, any succession shall, before the successor shall have become entitled thereto in possession, have become vested by alienation, or by any title not conferring a new succession, in any other person, then the duty payable in respect thereof shall be paid at the same rate and time as the same would have been payable if no such alienation had been made or derivative title created; and where the title to any succession shall be accelerated by the surrender or extinction of any prior interests, then the duty thereon shall be payable at the time of such surrender or extinction of prior title." (*Id.*)

"SEC. 137. *And* * * the duty imposed by this act shall be paid at the time when the successor, or any person in his right or on his behalf, shall become entitled in possession to his succession, or to the receipt of the income and profits thereof, except that if there shall be any prior charge, estate, or interest, not created by the successor himself upon or in the succession, by reason whereof the successor shall not be presently entitled to the full enjoyment or value thereof, the duty, in respect of the increased value accruing upon the determination of such charge, estate, or interest, shall, if not previously paid, compounded for, or commuted, be paid at the time of such determination." (*Id.*)

By section 144, the Commissioner, in his discretion, was authorized "upon application made by any person who shall be entitled to a succession in expectancy, to commute *the duty presumptively payable* in respect of such succession for a certain sum to be presently paid," &c. (*Ib.*, 290.)

Section 146 authorized the Commissioner, at the request of any successor, to "cause to be made so many

separate assessments of the duty payable in respect of the interest of the successor in any separate tracts of real estate, or in defined portions of the same tract, as shall be reasonably required."

BRIEF.

The purpose of citing these several sections is to sustain and enforce the proposition that the tax in controversy, and the right thereto, accrued prior to October 1, 1870, viz, December 4, 1867, upon the death of the testator. It differs from legacy, income, and other such taxes, in being a charge upon property specifically, instead of upon an individual; and from special taxes, like those upon spirits or tobacco, for the same reason, and because those are laid upon certain classes of manufacturing business and their products, while this is solely upon property itself, regardless of person, ownership, use, or income, so far as these incidents might relate to the *existence*, and not to the *amount* of a tax. It is strictly a charge *in rem*, attaching to the land itself; therefore it may, by section 146, be assessed upon each separate tract or interest. The *time* when it first so attached is fixed by that when the *title* first devolves. That portion of this act relating specially to this subject commences with the declaration "that the term 'succession' shall denote *the devolution of title* to any real estate." (13 Stats., 287, § 126, cited *sup.*) Then the succession must first exist, *eo instanti*, when the *title* devolves, no matter how or from whom it is deraigned, or when possession is to be taken under it; when, in case the title is devolved by will, the devisee is entitled *in expectancy* to any real estate. (13 Stats., 287, 288, § 127.) As to "every such succession as aforesaid," a tax

Blanchard v. Blanchard, 1 Allen. 223

or duty is to be levied and paid, according to rates, dependent upon the relationship between the predecessor and successor, fixed by section 133. The *time* when it is payable is "when the successor * * * shall become entitled in possession." (Sec. 137, above printed.) The several sections, over and over again, recognize that the devolution of title creates a succession, whether the estate devolved be one "in possession or expectancy." There is but one succession, arising when the title descends, though the time for paying the tax may be hastened by the surrender of prior interests, (sec. 135;) or it may be payable from time to time, in installments, as incumbrances or charges are extinguished. (Secs. 137 and 142.) See S. Martin Leake's Essay on the Theory of Property, as to "Successive Intervals of Use." (1 Jurid. Soc. Papers, 537.)

Therefore, by section 132, a deed given without consideration creates immediately and *ipso facto* a succession, though the grantee may not enter upon *possession* of the granted premises, or be entitled thereto, until some subsequent time, when the duty will be payable.

Section 143 says the Commissioner may *compound* the duty, and by the next section (144) he is authorized, "upon application made by any person who shall be entitled to a succession in expectancy, to *commute the duty presumptively payable in respect of such succession* for a certain sum to be presently paid; and for assessing the amount which shall be so payable he shall cause *a present value to be set upon such presumptive duty.*" (13 Stats., 290, § 144, above printed.)

This is the general nature of a commutation. Something is paid presently in lieu of a larger sum, which otherwise would have to be paid at some future time,

either fixed or ascertainable upon the happening of a contingency.

It is "the duty *presumptively payable* in respect to such succession" of the applicant that is to be commuted. The successor may die; Congress may repeal the law so as to release the tax; the facts may not come to the knowledge of the assessor holding that position when the expectant estate is exchanged for one in possession; possibly other contingencies may intervene; but, upon the then existing circumstances of fact and law, the tax is presumptively payable, and is commuted, because it is a subsisting charge upon the estate to which the applicant has a title in expectancy, and which he doubtless expects to have to remove; otherwise he would not ask to commute. Being upon the estate, to be paid by somebody, he realizes that a commutation will enure to the benefit of him who first, after the passage of the act of June 30, 1864, comes into possession by descent or devise. As it was a charge and lien upon the land, it became immaterial by which of any number of successors that might become apparently entitled between the death of the ancestor or testator and the entrance into possession it was removed. (Sec. 134.) Therefore we deem the circumstance which appears to have influenced the decision of the circuit judge, (Op., Record, 5, folio 14,) that the person against whom the tax might ultimately be assessed was uncertain, to be immaterial; while we cannot assent to his view that the value or rate was any more uncertain than they would have been had the defendants in error been actually in possession prior to July 14, 1870. The tax had accrued. It accrued against Wm. P. Mason if he entered into possession under that devolution of title which created his succession. It had accrued upon the

land. The value and rate were always to be ascertained long after the succession accrued. Upon the point of the time at which the tax accrues the case of May *v.* Slack, 16 Int. Rev. Rec., 134, before Clifford and Lowell, JJ., is an authority. (Meredith *v.* United States, 13 Peters, 494.)

EDWIN B. SMITH,
Assistant Attorney-General.

○

Motion has only regard to powers of executors as to estate at 1867

Supreme Court of the United States,

OCTOBER TERM, 1876.

No. 201.

OTIS CLAPP, PLAINTIFF IN ERROR,

v.

WILLIAM P. MASON ET AL., DEFENDANTS IN ERROR.

BRIEF FOR DEFENDANTS IN ERROR.

William P. Mason died December 4, 1867, leaving real estate to his widow for life, remainder to the defendants.

The widow died June 17, 1872.

A succession duty was thereupon assessed upon defendants, and was paid to plaintiff under protest.

Defendants duly made claim upon the commissioner of internal revenue, for the refunding of the tax, and the claim was rejected (Record, p. 3).

Defendants brought suit to recover the tax, and obtained the judgment now sought to be reversed.

The internal revenue act of 1864, §§ 126 to 150, provided for the levying of succession duties.

The act of 1870, ch. 255, § 3, repealed the taxes on legacies and successions after October 1, 1870; but § 17 of the same act provided, that "all acts relating to the repealed taxes should continue in full force, for levying and collecting all taxes properly assessed, or liable to be assessed, or accruing under former acts."

The question raised by the record is, whether a succession

duty had already accrued against the defendants in error at the time of the repeal, so as to be saved by the language of the 17th section.

Defendants respectfully call the attention of the court to the opinion of SHEPLEY, J., in the court below (Record, p. 4); and also submit the following:—

1. By § 137 of the act of 1864, the succession tax was not payable until after the successor became entitled to possession; and by act of 1866, ch. 184, the assessment could not be made till thirty days after the successor went into possession. Accordingly, no attempt was made to assess the defendants in error until more than thirty days after the death of the life tenant, and it will not be claimed that they were assessable on October 1, 1870, when the duties were repealed.

13 Stat. at Large, p. 289.
14 Stat. at Large, pp. 140, 141.

2. Nor can it be claimed that the defendants' liability to the tax was fixed, and only the time of payment postponed till thirty days after the death of the life tenant.

(*a*) The defendants' claim to the succession might have passed by devise, descent or alienation, through many hands before the death of the life tenant, and only the person who actually entered upon the enjoyment of the succession would be liable to assessment.

Act of 1864, ch. 173, §§ 133, 134.
13 Stat. at Large, p. 288.

(*b*) The amount of the tax, too, was uncertain until the person who was to pay it was ascertained; for it varied with the successor's degree of consanguinity to the predecessor.

Ibid.

(*c*) And if the property had been devoted to any charitable trust, before the succession vested in possession, the duty would have been wholly gone.

Act of 1870, ch. 255, § 27. V. 16. 256.

3. Nor can it be said that the tax had become a lien upon the real estate, and so had accrued against the property, if not against the defendants; for by § 145 of the act of 1864, no lien exists until after assessment.

13 Stat. at Large, p. 290.

It therefore appears that at the time the repeal went into effect, it was uncertain what the amount of the succession duty would be, against whom it would be assessed, when it would be payable or assessable, and whether it ever would be payable or assessable at all.

A claim subject to such uncertainties cannot be said to have been "accruing" to the United States against these defendants.

4. The revenue authorities, in assessing this tax, relied on the decision of Judge LOWELL in *May* v. *Slack*, 16 Internal Revenue Record, 134 (Record, p. 3).

But in that case the testator died in February, 1870, and left certain legacies upon which the tax in question was assessed. It was claimed that, inasmuch as the executor did not pay the legacies till April, 1871, the tax had not accrued in October, 1870. But the legatee was absolutely entitled to the legacy, even if the executor had the right to withhold payment for a year. The legacy could have been attached for his debts. If he had died before it was paid, it would have gone to his personal representatives. All the elements which were uncertain and contingent in the present case, were fixed and determined in *May* v. *Slack*—the person to

take the legacy, the person to pay the tax, the rate and amount of the tax, the time at which it was payable. The tax was actually due to the government, beyond all contingency, at the date of the repeal, and therefore had "accrued" in the ordinary meaning of the word. The authority of *May* v. *Slack*, therefore, does not aid the government in this case.

5. Nor can it be said that the word "accruing," in § 17, is without force, unless it applies to cases like the one at bar.

Section 17 continues the existing revenue acts in force, "for levying and collecting all taxes properly assessed, or liable to be assessed, or accruing under the provisions of former acts."

If a life tenant had died less than thirty days before October 1, 1870, the tax could not have been "assessed," and would not have been "liable to be assessed," upon that day, because not assessable till thirty days after the successor should take possession.

Vide supra, 1.
" 14 Stat. at Large, 140, 141.

Yet it would have "accrued" to the government, because the right of the government would have become fixed and absolute. The person to pay would be determined. The amount to be paid and the time of payment would be fixed, or would be mere matters of computation. The remedy therefore would be saved, under § 17, by the force of the word "accruing;" and, without the insertion of that word, would have been lost.

7. The argument has thus far proceeded on the construction of the language of the statute of 1870, without considering its purpose or its practical working.

6. The word "accrue" is used in § 125 of the act of 1864, ch. 173, as to the legacy tax, in a manner which shows that it there means "has become due and payable;" and as that section was amended by statute of 1866, ch. 184, a legacy tax could not be said to accrue under it until the legatee was entitled to possession, either immediately or at some determinate future day, as in *May* v. *Slack*. And in §§ 128 and 129, the word "accruing" is used to denote the vesting of the right to the enjoyment of a succession. Construing the word in the repealing statute in the same way as it must be construed in the original act, it would apply only to such taxes as the government had a fixed right to collect against an ascertained person, at a time fixed or determinable by mere computation.

The construction contended for by the government will be found inconsistent with its purpose, and productive of results which could never have been intended by congress.

The act of 1870 was passed for the purpose of reducing and simplifying taxation.

It swept away the whole mass of special taxes, except only those on tobacco, spirits and malt liquors. §§ 1, 2, 3. It also provided for the consolidation of collection districts and the discharge of assessors, so that the machinery of taxation might be contracted in proportion to the diminished work it was to perform. §§ 18, 19. And it is well known that this diminution in the force of the department has been made.

Section 17 of the statute begins by repealing certain taxes on dividends and coupons, and then proceeds with the words under construction in this case. They are as follows: "and all acts and parts of acts relating to the taxes herein repealed, and all the provisions of said acts, shall continue in force for *levying and collecting* all taxes properly assessed or liable to be assessed or accruing under the provisions of former acts." The purpose of the proviso was not to abridge the benefit to the citizen of the sweeping repeal of future taxes, but to secure to the government its *remedies* for "*levying and collecting*" taxes to which its right was fixed.

If therefore, in the present case, the life tenant had died on the 29th September, 1870, the government would have had a right to a succession duty from the defendant, and the remedy to collect it would have been saved by § 17, although it was not "assessed," nor "liable to be assessed," for thirty days, because it had "accrued" to the government on October 1; that is, the liability of the defendant had been absolutely fixed, and nothing remained to be done but to compute its amount.

If, on the other hand, the claim of the government in this case is sustained, and the tax is held to have accrued against these defendants during the life of the life tenant, then it

follows that it had accrued from the date of the testator's death; and it would equally follow that in all cases where a life estate was created before October 1, 1870, the right to a succession duty on its termination accrued to the government, and was preserved by § 17 of the repealing act.

If therefore a testator died September 29, 1870, leaving real estate to a child a day old, or *en ventre sa mère*, for life, and remainder over, the government had, on October 1, 1870, an accrued right to the succession tax upon the termination of the life estate, which it may enforce, perhaps, eighty years hence, and which, meantime, is a cloud upon the title to the land.

And as the act of 1864 imposed the succession tax upon then existing expectancies, as well as upon those to be created thereafter, if a life estate was created fifty years ago, and the life tenant survived both the act of 1864, taxing the succession, and the act of 1870, repealing the tax, the claim of the government against the remainder man could be enforced, upon the death of the life tenant, at any time after October 1, 1870.

In short, if plaintiff is right, the repeal of the succession duties applies only to successions created by instruments made to go into effect after October 1, 1870.

Now these taxes were abolished, as appears by the debates in congress, for the reason (among others) that the revenue from them was very small, and would not pay for collection after other special taxes were abolished, as it would be necessary to maintain a special force of assessors for them alone.

Cong. Globe, 1869–70, part 5, p. 4708, remarks of Senators Sherman and Casserly.

Congress could not have intended, therefore, to repeal the tax only as to successions created under future deeds and wills, and leave it standing as to all the successions already

created which might fall in during the next century, as life tenants die from time to time. For if a force of assessors were to be kept up to collect these duties, there would be no economy in repealing the others, and only a diminished return to the government.

Certainly such an intent should not be inferred from a clause reserving remedies in an act whose main purpose was to relieve the people from needless burdens.

Probably the collection of these taxes has already been abandoned, as the present machinery is notoriously inadequate for their assessment; but if the plaintiff prevails in this case, they stand as a cloud upon titles throughout the land, a source of great vexation to the people, without any return whatever to the government.

GEO. PUTNAM, JR.,
for Defendants in Error.

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1 Allen 223

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1 Wis 565-459

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